United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1793

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B p/s

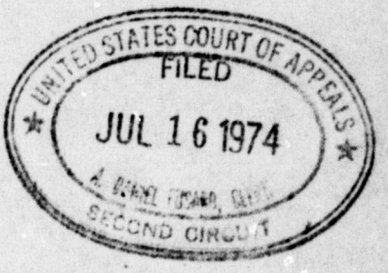
RACHEL EVANS, et al.,

Appellants,

-v-

JAMES T. LYNN, et al.,

Appellees.



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

OTHER AUTHORITIES

Statement of the Issues Presented for Review

1. Whether the District Court adhered to accepted principles governing standing to challenge federal administrative actions in dismissing the appellants' complaint.

2. Whether the appellants come within the zone of interests protected by the Federal Fair Housing Act.

3. Whether appellants have standing to challenge appellee Tri-State's abdication of its civil rights responsibilities.

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STATEMENT OF THE CASE

At issue in this appeal in whether low-income minority citizens who reside in racial ghettos in Westchester County, New York, have standing to challenge in federal court actions by federal administrative officials which effectively undermine fundamental national civil rights policies designed to relieve

or eliminate ghetto living and patterns of residential segregation. Appellants maintain that two federal community grants-in-aid approved by two federal agencies for the virtually all-white Town of New Castle in Westchester County were made in violation of provisions of the Federal Fair Housing Law of 1968 and the Civil Rights Act of 1964. The appellants were intended to be the beneficiaries of these legislative acts and therefore must be deemed to have standing to insure administrative compliance with these laws.

The complaint was filed in the United States District Court for the Southern District of New York in August, 1973 [1a-16a]. It contested the legality of grants approved by the Department of Housing and Urban Development (HUD) and by the Bureau of Outdoor Recreation, Department of Interior (BOR). The HUD grant was to the King-Greeley Sewer District, a special municipal district within New Castle, for construction of a sanitary sewer system; the BOR grant was to the Town itself for acquisition of land known as Turner Swamp for use as a recreation area. The appellants alleged that both agencies violated federal civil rights laws including the affirmative action sections of Title VIII of the 1968 Civil Rights Act ("Fair Housing Law") and the prohibition against discrimination in federal programs in Title VI of the 1964 Civil Rights Act.

Appellants contended in their complaint that New

Castle maintains a racially and economically discriminatory housing and community development program which mandated denial of federal community development assistance. Appellants further contended that approval of these grants without any evaluation by HUD and BOR of the Town's discriminatory development policies directly maintains a growing pattern of racial residential segregation in Westchester County that has constrained the appellants to reside in racially concentrated areas of the County. Thus, appellants also sought certification to sue on behalf of a class of low and moderate income, minority residents of Westchester who are constrained to reside in racially concentrated neighborhoods in the County -- an issue not resolved below because of the district court's ultimate disposition of this case.

A separate aspect of the complaint involved the appellants' challenge to the failure of the appellee Tri-State Regional Planning Commission (Tri-State) to review and comment upon the civil rights impact of the New Castle applications for the HUD and BOR grants. The complaint alleged that Tri-State declined to review these applications on the grounds that they lacked "regional significance" and that by so doing, Tri-State abdicated the responsibility imposed on it by law and federal policy to comment on the civil rights implications of federal grant applications. The appellants

contended that Tri-State thereby acted ultra vires its statutory authority, under the Intergovernmental Cooperation Act of 1968, the Metropolitan Demonstration Cities Act of 1965 and Circular A-95, revised, of the United States Office of Management and Budget.

On September 13, 1973, the Federal appellees moved to dismiss the complaint on several grounds including an alleged lack of standing [17a]. On September 24, 1973, appellee Tri-State also moved to dismiss [39a].

On October 9, 1973, the appellants moved for a preliminary injunction restraining HUD and BOR from distributing any monies to New Castle pursuant to the grants being contested [19a].

These motions were consolidated and a hearing was held in the district court on October 19, 1973. In the course of argument, the district court noted that a decision could not be rendered without some factual record establishing what civil rights enforcement procedures, if any, were undertaken by HUD and BOR with respect to the challenged grants. As a result, the Court directed the United States Attorney to make available to the Court and appellants the administrative files for each of the two grants and to produce for depositions federal administrative officials involved in processing the grants and administering the civil rights policies of the

agencies [98a-99a].

The district court did not restrain the government from distributing the funds during this pre-trial discovery period, as the United States Attorney advised the Court that disbursements were not imminent and that the Government would give the Court and appellants forewarning if transfers were about to occur -- thereby enabling appellants to renew, if necessary, their application for injunctive relief [92a].

On March 9, 1974, the Town of New Castle and the King-Greeley Sewer District sought permission from the district court to intervene in this action. The Court initially reserved decision on that request, but granted the Town and Sewer District permission to file papers in support of the pending motions to dismiss and permitted them to depose the appellants. On April 15, 1974, the Town and Sewer District, by way of motion, joined in the Federal appellees' motion to dismiss for lack of standing [43a]. In its final memorandum opinion and order, the district court granted the intervention [97a].

On May 22, 1974, the district court issued its memorandum opinion and order dismissing the complaint in all respects on the grounds that the appellants lack standing to sue [90a]. Although the district court found that: "It is thus clear that New Castle continues to be resistant to attempts to alter its present housing character" [96a] (i.e., a "predominately

white and well-to-do enclave" [95a]) and that "plaintiffs' present alleged ghetto living conditions are a very real and very serious injury;" the district court concluded that this injury "is in no way linked to the particular grants complained of herein" [102a].

Appellants filed this appeal and immediately moved for an injunction pending appeal restraining fund disbursements. On June 18, 1974, this Court denied appellants' motion for an injunction pending appeal, but ordered an accelerated briefing and argument schedule for the appeal.

STATEMENT OF THE FACTS

Westchester is a County of extreme contrasts. On one hand, the County contains some of the wealthiest communities in the nation; for the most part, these communities are located in the northern part of the County. In contrast, there are a series of poorer, older areas in the County in which the majority of Westchester's minority families, including the appellants, live; for the most part, these areas are in the southern and western parts of the County. Challenged are federal grants to the Town of New Castle, a community which epitomizes the white, affluent portions of the County and a Town which has fought construction of housing which would be available to appellants. It is within this context of racially

impacted living conditions that the appellants determined to contest the process whereby the Federal appellees provided federal community development grants-in-aid to New Castle. It is also within this context that they questioned the failure of these officials to adhere to the applicable federal civil rights statutes designed to relieve patterns of racial residential segregation.

Westchester's Minority Population

The appellants are four minority residents of Westchester County who reside in the racially segregated portions of the County. They live in the communities of Yonkers, Peekskill, White Plains and Ossining [2a-4a]. According to the 1970 census, these communities, along with Mount Vernon and New Rochelle, account for almost 75 percent of the total non-white population of the County.

Overall, non-whites comprise approximately 10% of Westchester's population [95a-96a]. The residential confinement experienced by this non-white population is dramatically shown by the fact that while Westchester's total non-white population increased by 28,897 persons from 1960 to 1970, 21,000 of those minority persons, or 72%, moved into the older communities of Mount Vernon, New Rochelle, White Plains and Yonkers, which already housed 63.4% of the County's non-white population as of the 1960 Census [25a].

All of the appellants have low or moderate incomes and all are confronted with a housing problem exacerbated by

discrimination and segregation in housing in the County [3a-4a; 87a-89a]. One of the appellants, Fernell Patterson, who has a moderate income has "resided in Westchester County since 1960 and during that time, I have always been constrained to reside in racially concentrated areas" in the County. Patterson's neighborhoods have all been "characterized by dilapidated housing and inadequate levels of municipal services " [87a-88a].

Appellant Brooks resides in a severely dilapidated apartment in Ossining [4a]. Appellant Evans, who was forced to relocate from two different dwellings in Peekskill as a result of urban renewal demolitions [2a] now resides in public housing in that community [Evans Deposition, pp. 14-15]. Appellant Kidd resides in a dwelling with serious plumbing and structural defects [3a]. The district court concluded that the appellants' allegations of ghetto living conditions "are a very real and serious injury" [102a].

The Town of New Castle

The Town of New Castle is a "predominately white and a well-to-do" suburb [95a] located in northern Westchester County, approximately 35 miles north of Manhattan and no more than 20 miles from the southern Westchester cities [24a, 45a]. The Town has a land area of approximately 25 square miles [45a]. Approximately 7000 acres of land in the Town is vacant and

suitable for development [28a-29a]. Almost 90% of the Town is restricted by the local zoning ordinance to the development of single-family homes on parcels of at least one acre. Two-family houses, garden apartments and all other forms of multi-family housing are prohibited [26a-27a]. As a result, those forms of housing which are available for lower-income families are excluded and only the most expensive form of housing may be built. This is attested to by the fact that the median value of single-family houses in New Castle in 1970 was in excess of $50,000 [26a, 95a].

The minority population of New Castle is only 1.3% [95a-96a] and only 2% of New Castle's population increase from 1960 to 1970 was non-white [25a].

The cost of housing in New Castle certainly contributes to the problem of exclusion of minority citizens. It is generally held that a family can only afford a mortgage on a new home which has a sales value of up to twice that family's annual income [26a]. Since the median value of single-family houses in New Castle (virtually the only form of housing available in the Town) is in excess of $50,000 [26c, 95a], a family would have to have a family income of at least $25,000 per annum to purchase such a residence [26a-27a]. Only 3% of Westchester County's Black population and 4.2% of its Puerto Rican population have incomes in excess

of $25,000 per annum [28a].

The median family income in New Castle in 1970 was $22,005 as compared with $11,349 in Westchester as a whole [96a]. The median income for Black families in Westchester was $8,639, and for Spanish families $7,889 [28a].

As the district court found in its opinion, "New Castle continues to be resistant to attempts to alter its present housing character." [96a]. The Town's Master Plan sets as a goal "maintaining New Castle as a single-family residential community," and specifically provides with reference to the development of sanitary sewers, that "the provision or extension of water and sewers in low [density] residential areas shall not . . . be considered as a basis for rezoning to higher residential density." [29a]. The district court also found that New Castle "successfully thwarted" an attempt by the New York State Urban Development Corporation to construct a small 100-unit low-cost housing facility in the Town [96a].

In 1969, New Castle, through the King-Greeley Sewer District (which was organized by the Town pursuant to New York Town Law), requested federal aid from HUD for the construction of a sanitary sewer facility in the Hamlet of

Chappaqua in New Castle pursuant to the Federal Water and Sewer Facilities Grant Program, 42 U.S.C. 3102 [93a]. Similarly in 1972, the Town submitted an application to BOR for Federal funds to aid in the acquisition and development of a public park and outdoor recreation area in what is now known as Turner Swamp, pursuant to the Land and Water Conservation Fund Act, 16 U.S.C. 460 L (8), [93a].

The HUD Grant

After completion of some preliminary procedures, including submission of the New Castle sewer application to Tri-State for review, the New York Area Office of HUD (NYAO) assigned Robert Mendoza, a HUD resources representative, to review the New Castle application and to assign it a rating which would determine its place on the "priority" list of projects to be funded in the New York area [182a]. On March 7, 1972, Mendoza visited the Town of New Castle in the company of Gerald Cruise, Program Director of the NYAO [183-184a] to do an on-site inspection of the proposed project area and to consult with New Castle public officials. This inspection consisted of a drive through the project area and an hour and a half meeting with local officials [183-184a]. Mendoza stated that one or two days later he completed a HUD rating sheet on the application, except for the financial rating which was completed by a financial officer in the

area office.

The rating sheet score was 41 out of 100 possible points [189a-190a]. The New Castle application was then placed on a list for potential funding in fiscal year 1972 but was not funded because of its relatively low score [154a-157a]. The New Castle application was then carried over into the first quarter of fiscal year 1973 when it was finally given funding approval because in the Program Manager's words, "A certain combination of fortuitous events took place." [156a]. According to the Program Manager, these events included the fact that money was released by the Regional Office of HUD early in 1973, and the area office wanted to show some evidence of activity in the first quarter of fiscal year 1973. The New Castle application was one of the very few completed applications on hand, having been carried over from 1972 [157a].

In January 1973, Directors of Suburban Action Institute, a non-profit, civil rights organization, wrote a letter of complaint to HUD detailing New Castle's discriminatory land-use and community development policies and asking HUD to reconsider approval of the sewer grant [30a]. This complaint stimulated an inquiry from the Regional Office of HUD to the NYAO about the grant and led to the discovery that there was no rating sheet for the project in the administrative file [139a]. As a result, someone in the Regional Office

directed the area office to "reconstruct" the rating sheet [140a]. In February 1973, Mendoza, the original project reviewer, was summoned from the Boston office, where he had been transferred, to return to New York and to produce a new rating on the basis of his recollection [185a-186a].

After completing the "reconstructed" rating sheet, Mendoza gave it to the Program Manager who signed his name at the bottom and back, dating it to the previous March on his assumption that he would have signed the original sheet on approximately such a date; however, when questioned, he could not recall ever signing an original rating sheet [144a]. Similarly, he gave the sheet to his superior who also signed the document and back-dated his signature; once again, there is no indication that the superior had ever signed the original [147a]. The Regional Administrator testified that he approved this "reconstruction" [123a-124a]; he simply expressed unhappiness at the sloppiness of office procedures [123a].

This document was submitted to the district court by the United States Attorney. Subsequently, the United States Attorney informed the Court and counsel for appellants that this document was a "reconstruction". [220a-221a].

The one result of the administrative civil rights complaint to HUD was a de novo rating of the application by Susan Alem in her capacity as the regional person responsible

for monitoring community development grant applications processed in the area offices. Her rating indicated that the New Castle application should have received approximately a maximum of 30 points [176a]. In reviewing the "reconstructed" rating, Alem disagreed with the points awarded for financial need, stating that New Castle should have received no points in this category of the rating because of its extreme wealth and the attendant ability to finance its own sewer system [175a, See "reconstructed" rating sheet, 222a].

The program manager of the area office testified that it was the practice of the New York office not to invite full applications for projects receiving less than 40 points. Alem concurred in this view, stating that 41 points was the lowest rating of a sewer application ever approved in the New York area and that a project with a 30 point rating would not normally be funded [177a].

The Regional Administrator of HUD, Green, stated that in his view the absence of low and moderate-income housing in a community is not a bar to the grant of a sewer application. Green further testified that even overt practices of housing discrimination are not taken into consideration in reviewing sewer applications except insofar as they are reflected in HUD's preliminary rating sheet system. He stated that HUD had no basis for passing on applications other than the rating system [115a]. The project rater, Mendoza, testified

that he never reviewed the housing and land-use policies of an applicant community and never consulted with the Equal Opportunity office of HUD prior to rating a sewer application [194aa-194ca]

The BOR Grant

The BOR grant arose out of a 1972 decision by New Castle to acquire and develop approximately 33 acres of land known as Turner Swamp for the purpose of creating a public park and outdoor recreation area. Under the outdoor recreation program, virtually the entire review of grant applications is done by the state liaison officer who is appointed by the Governor of each state to obtain and administer outdoor recreation grants for the state [205a-206a].

Thus, New Castle initially applied to the New York State Director of Parks and Recreation who completed the analogue to HUD's rating sheet for sewer projects. ("New York Statewide Comprehensive Outdoor Recreation Plan Priority System." [230a]). The Regional Director of BOR testified that BOR would consider any application from New York which received at least 5 points out of a possible 14 [212aa].

The BOR project officer received the New Castle application after the statewide liaison officer had performed the rating and reviewed the materials submitted by New Castle

for completeness and consistency [199aa-199ba]. The project officer testified that the only civil rights effort on the New Castle application was the Title VI Compliance Assurance signed by the Town Supervisor. He further testified that he did not, nor did any other BOR representative to his knowledge, make any effort to determine the nature of New Castle's housing and community-development practices, and that he was unaware of any BOR policy with respect to the Title VIII obligation to promote fair housing opportunity in connection with the outdoor recreation program [202a-204a, 207a].

Federal Civil Rights Enforcement Policies

The affidavit of Howard A. Glickstein, former staff director of the United States Commission on Civil Rights, [31a-38a] catalogues the failure of federal civil rights enforcement in community development programs on a national level. Glickstein states that the Civil Rights Commission undertook a review of the federal civil rights enforcement effort which culminated in the publication of several reports on the matter [32a].

The first report was issued in October, 1970 and is entitled "Federal Civil Rights Enforcement Effort." [32a]. In that report, the Civil Rights Commission focused on the extent to which HUD and other federal agencies had administered their community development programs affirmatively

to achieve fair housing opportunities. The Commission viewed implementation of this section as the key determinant of the success of the Fair Housing Law [22a-34a]. The Commission concluded, however, that HUD "had devoted itself to processing individual complaints of housing discrimination to the exclusion of all other responsibilities under the Act."

A Reassessment Report issued in 1972 indicates that HUD is still failing to seek enforcement of the affirmative obligation section of the Fair Housing Act [35a]. It concluded that HUD carried out no compliance reviews whatsoever of community development programs in communities alleged to have discriminatory housing and land-use practices [35a]. Moreover, the Report concluded that the HUD water and sewer program is the only HUD community development program which has no requirement that steps be taken to expand low and moderate-income housing opportunity within an applicant community [35a]. The Report also noted that HUD's performance contrasted with that of the Environmental Protection Agency because that agency has "begun to inquire into the exclusionary impact of a community's land-use laws before approving funds for its own Waste Treatment Construction Program"[35a-36a].

In the 1970 Report, the Commission criticized the Department of Interior's entire administrative civil rights

enforcement structure and found that in the BOR program, the civil rights compliance investigators relied on the state liaison office to fill out the review report [36a]. Glickstein further states that the Department of Interior has completely failed to promulgate regulations which would seek to insure non-discriminatory access to recreation areas and to encourage fair housing opportunity in applicant communities [37a].

Tri-State Regional Planning Commission

The Tri-State Regional Planning Commission was established in 1965, pursuant to an Interstate Compact that was adopted by the states of New Jersey, New York and Connecticut and authorized by Federal statute, 40 U.S.C. 471 (f). Tri-State was established "to embrace responsibility for comprehensive planning for the compact region" and "[to] assur[e] the continued qualification of the party states for Federal funds." Article I, Section I of the Compact.

One of Tri-State's principal tasks is the "A-95 review" of state and local grant applications. This task arises under the Demonstration Cities and Metropolitan Development Act of 1965, (42 U.S.C. 3334), the Intergovernmental Cooperation Act of 1968, (42 U.S.C. 4231), and, specifically, under Circular A-95 promulgated by the United States Office of Management and Budget. Under the "A-95"

system, every local applicant for funding in a variety of federal programs, including the community development programs challenged herein, must first submit a preliminary application to designated State and Metropolitan Clearinghouses for regional planning review. Tri-State has been designated by OMB as the Metropolitan Clearinghouse for the New York metropolitan area. [6a].

New Castle submitted both its application for the HUD sewer grant and for the BOR outdoor recreation area grant to Tri-State. In both cases, Tri-State declined to review the applications from New Castle on the grounds that they lacked "regional significance." [9a, 236a].

Pursuant to a contract entered into between Tri-State and the Westchester County Planning Commission, Tri-State then delegated review of the New Castle applications to the Westchester County Planning Commission (See Tri-State's Answer to Interrogatory #7). The administrative records furnished to the Court are devoid of any indication that the New Castle applications were circulated to "local civil rights agencies" for comment upon the "extent to which the project contributes to more balanced patterns of settlement and [more effective] delivery of services to ... minority groups" as required by the OMB Circular A-95, paragraph 5(d). The record

is also barren of any indication that Tri-State has ever required the Westchester County Planning Commission to implement the civil rights review requirements mandated by the A-95 Circular.

ARGUMENT

I. INTRODUCTION TO ARGUMENT

The fundamental misconception that pervades the district court's opinion is that the appellants' complaint is exclusively directed at the housing and zoning practices of the Town of New Castle. As to the Federal defendants, the court concludes that appellants have expressed no more than a "value preference" for proper federal administrative behavior.

The essential error in the district court's reasoning is contained in its observation that "[in order] to declare the federal policies unlawful, it would have to be established that New Castle's zoning laws result in unconstitutional racial and economic segregation." [104a]. This view totally ignores the independent civil rights enforcement responsibilities of HUD and BOR which transcend any analysis of New Castle's zoning laws.

By starting with this erroneous view of the appellants' claims, the district court then concludes that plaintiffs have not demonstrated sufficient "injury in fact" for standing to sue. The court looks for this injury in fact in only one direction - New Castle's zoning laws and their effect on appellants.

The district court concedes that appellants' "ghetto living conditions are a very real and very serious 'injury'," but refuses to recognize the nexus between that injury and the complete failure of federal civil rights enforcement with respect to the New Castle community development grants.

The district court fails to find the nexus precisely because it looks only in the direction of New Castle's housing and land-use policies. Then, ironically, the district court arrives at the final conclusion that appellants "have not shown that they have suffered or will suffer any injury arising out of, or relat[ing] to, the applications of the procedures in question." [102a]. Appellants now ask this Court to truly focus on the "procedures in question" and on the direct agency violations of the civil rights laws. Appellants believe that this court will then conclude that appellants' very real injury has a direct and material nexus with the government procedures in question.

Appellants stress that their complaint flows exclusively from the failure of HUD and BOR to implement a law enacted by Congress to reverse the past history of federal grant programs. That history was one of grants which reinforced existing patterns of racial segregation. In failing to adhere to that law, the appellant agencies have continued

to reinforce those patterns; they have neglected to administer the civil rights requirements of the community development assistance programs to promote an increased supply of integrated housing and, thereby, to begin to redress the plague of racial residential segregation that has beset Westchester County. It is not for the judiciary to question the wisdom or effectiveness of this statutory remedy. It is for the judiciary to insure that a duly enacted civil rights law is not frustrated.

Appellants are Black citizens suffering from a lack of fair housing opportunity in the County in which they reside. But for the total failure of civil rights enforcement made out in the record below, there would have been federal initiative leading to the creation of fair housing opportunities and the elimination of racial residential segregation in the County.

It is the total absence of meaningful civil rights enforcement in the two community development grants to New Castle that led the appellants to allege substantial injuries to themselves and to the class they seek to represent. They are precisely the minority individuals who suffer from racial concentration and inadequate housing opportunity in Westchester County -- a condition that affects "the very quality of their daily lives." Shannon v. HUD, 436 F. 2d 809, 818 (3rd Cir. 1970)

The problem of community development and its effect on growing racial residential isolation in America's metropolitan areas is not one which can be viewed in terms of the development within a particular set of boundaries. The impact of federal community development assistance to New Castle has reverberations for all of Westchester County because, as a "white and well-to-do enclave," New Castle is only one-half of the pattern of segregation -- the neighborhoods in Peekskill, Ossining, White Plains and Yonkers where appellants reside comprise the other half. Clearly the federal government with its congressionally bestowed influence over housing and development in America's cities and suburbs is in a position to have substantial effect on the appalling growth of racial ghettoization. Congress explicitly recognized this fact when it enacted the "affirmative" duty sections of the Fair Housing Act.*

Thus, the issue before this Court is not really whether the appellants have suffered "injury in fact", as the district court framed the question -- for they surely do suffer such an injury. The issue is whether the court will concede the Congressionally mandated nexus between that injury,

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* See discussion of Legislative History of Title VIII, infra, at p.44.

residential segregation, and the failure of HUD and BOR to implement their statutory civil rights obligations under Title VIII of the 1968 Civil Rights Act (Fair Housing Act) and Title VI of the 1964 Civil Rights Act.

Appellants have set forth the appalling administrative behavior challenged herein in the statement of the facts to underscore the urgency of full judicial review; and to stress again that the focus of this litigation is the specific and nationwide abdication by HUD and BOR of their statutory civil rights obligations, as reflected by their failure to engage in any meaningful civil rights review of the New Castle applications for federal community development grants.

The housing and land-use policies of New Castle are certainly an effective measure of the extent to which HUD and BOR have violated their independent civil rights obligations. The failure with respect to the New Castle grants, however, is not an isolated occurence; but, rather, it is part of a formal agency policy of actively promoting and sustaining local housing community and development programs, notwithstanding that these programs maintain the "white and well-to-do enclave[s]" noted by the district court. [95a]

What the appellants ask this Court to do is accord these civil rights laws before it the generous reading necessary to assure a viable, meaningful guarantee of equal opportunity to all citizens. By adopting these laws, and particularly the Fair Housing Act, Congress has provided what Mr. Justice Stewart described as "a complete arsenal of Federal authority" to promote civil rights. By holding that the appellants' "alleged ghetto living conditions" are "in no way linked to the particular grants complained of", the district court has ignored the Congressional mandate and has refused to accord the Civil Rights statutes a "sweep as broad as [their] language." Griffin v. Breckinridge, 403 U.S. 88, 97 (1971)

The Supreme Court and other federal courts have been particularly sensitive to the necessity for judicial review of agency actions to insure effective implementation of the Congressional intent to eliminate all forms of racial discrimination. Thus, the Supreme Court has repeatedly declared that the Civil Rights Acts evince a congressional intention to define standing as broadly as is permitted by Article III of the Constitution. Trafficate v. Metropolitan Life Insurance Co., 409 U.S. 205, (1972); O'Shea v. Littleton, ___ U.S. ___, 94 S.Ct. 669, 675, Fn. 1, (1974) This federal view of standing under the Civil Rights Acts has even led the Supreme Court to conclude that "Congress may

enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (emphasis added). Trafficante, supra at 212 (White, J. concurring), Linda R. S. v. Richard D., 410 U.S. 614, at 617 n. 3. (1973); O'Shea, supra, at 675 fn. 1. This liberalized view by the Supreme Court of the scope of the Civil Rights Acts in question and of the necessity to implement the broad Congressional remedies provided by these laws constitutes the background for this Court's review of the district court's decision to deny appellants' standing to sue.

II. THE DISTRICT COURT FAILED TO ADHERE TO THE ACCEPTED PRINCIPLES GOVERNING STANDING TO CHALLENGE FEDERAL ADMINISTRATIVE ACTIONS

There are two essential and related components to appellants' argument that their standing to sue should be readily accorded them by this Court. First, appellants note that the broadest possible standing is available to individuals who challenge federal administrative actions under the Administrative Procedure Act, 5 U.S.C. § 702, and under other federal statutes authorizing review of agency action by "aggrieved" parties. This is particularly true in cases where the individuals suing are representative of a large class of individuals and raise questions involving the public interest. In such cases, the Courts have recognized that an attenuated injury suffered in common with many others may still be sufficient to establish standing to sue. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); United States v. SCRAP, ___ U.S. ___, 93 S. Ct. 2405 (1973); Adams v. Richardson, 480 F. 2d 1159 (D.C. Cir. en banc 1973).

Secondly, as discussed in Point III below, the Courts have been particularly sensitive to the requirement of a liberalized test for standing under the Federal Fair

Housing Act in order to implement the critical Congressional goals of equal housing opportunity and the elimination of racial residential segregation. The courts have looked in particular at the unique legislative history and language of Title VIII and concluded that Congress intended to provide for comprehensive enforcement of the Act. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); Shannon v. HUD, supra. As indicated in the Introduction to Argument, the appellants contend that the Congressional purpose in enacting Title VIII is the key element of the nexus between their injury and the administrative conduct challenged by appellants.

In sum, these two components of standing to challenge federal administrative actions relating to civil rights enforcement indicate that the District Court's reliance on this Court's recent decision in Warth v. Seldin, (Nos. 73-1748, 1749) (2d Cir. April 18, 1974), was misplaced.

Of critical importance is the fact that the Supreme Court has consistently granted standing to review federal administrative actions under federal statutes like the Administrative Procedure Act which confer the right of judicial review on persons "aggrieved" by administrative decisions. Association of Data Processing, Inc. v. Camp,

397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Hardin v. Kentucky Utilities, 390 U.S. 1 (1968); SCRAP, supra.

In large part, the liberalized definition of standing which the Supreme Court has brought to its analysis of the concept of persons "aggrieved" by agency action reflects the Court's deference to a Congressional intent to authorize broad judicial review of administrative decisions. The Supreme Court stressed this point in Data Processing, supra, writing:

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend. 397 U.S. at 154.

To this end, the Court in Data Processing outlines the two-pronged test for evaluating standing to sue. The requirements, as noted by the court below, are that plaintiffs allege an "injury in fact" and seek to protect an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (emphasis added). Id. at 152-153.

The Courts also have construed the "injury in fact"

requirement very broadly in order to allow judicial enforcement of laws intended to promote the public interest and which have a wide focus, e.g., laws relating to environmental protection or civil rights. SCRAP, supra; Trafficante, supra; Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (1965); Shannon v. HUD, supra. The extension of the concept of "injury in fact" has been explained by the importance of allowing litigants who function as "private attorney generals" to come forward and enforce statutes which further broad public policies.*

The SCRAP decision is particularly instructive

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* In Trafficante, supra, 93 S.Ct. at 367, the Supreme Court examined the legislative history of Title VIII and concluded that:

> Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which the Solicitor General says, the complainants act not only on their own behalf but also "as private attorney generals in vindicating a policy that Congress considered to be of highest priority." The role of "private attorney general" is not uncommon in modern legislative programs. See Norman v. Piggie Park Enterprises, 390 U.S. 400,402; Allen v. State Board, 393 U.S. 544, 556; Perkins v. Matthews, 400 U.S. 379,396; J.I. Case Co. v. Borak, 377 U.S. 426, 432.

because it demonstrates that a party may be "aggrieved" within the meaning of one of these public interest "legislative schemes" by suffering only a very attenuated harm as the result of federal administrative action.

In SCRAP the Supreme Court found standing where the plaintiff was an unincorporated association formed by five law students for the sole purpose of challenging an administrative decision by the Interstate Commerce Commision to allow a rate increase for railroad freight. The association alleged that the rate increase would serve as an economic disincentive for private industry to recycle products such as scrap metals. Plaintiffs alleged that they would be specifically harmed in their enjoyment of the forest, rivers and streams in the Washington area which they used for recreational purposes. The nexus between this harm and the challenged agency action was that without recycling there could be increased pollution of the recreational areas in and around Washington which these students used. The increased pollution would supposedly result from the unnecessary extraction of unrenewable resources and the discharge of otherwise recyclable materials (e.g., more litter). SCRAP, supra, at 2412-13 Fn. 9.

When contrasted with the Supreme Court's earlier decision in Sierra Club v. Morton, 405 U.S. 727 (1972), the lesson of SCRAP is clear. Individuals, in addition to asserting

a generalized "public interest" in housing or the environment, must also assert injury in fact traceable to them as individuals. Appellants' interest is far too real, touching on every aspect of theirdaily lives,to be a mere "public interest" and nothing more. As ghettoized minority residents of Westchester County, they are precisely the individuals who suffer from patterns of racial residential segregation -- patterns which are encouraged and perpetuated by the prospective federal grants-in-aid to New Castle, rather than affirmatively redressed by agency action, as commanded by Congress in the Fair Housing Act (42 U.S.C. 3608).

The role of the "private attorney general" is especially important when the relief sought, as here, is a comprehensive restructuring of nationwide federal agency civil rights enforcement policies. Under the various Civil Rights Acts of the past fifteen years,* private individual and class litigants have performed an important public function in addition to protecting their own personal interests. Accordingly, they have been held, upon proof of discrimination, to be entitled to comprehensive relief geared to dismantling

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* E.g. 42 U.S.C. 1971 (voting), 2000a et seq.(public accommodations), 2000b et seq. (public facilities), 2000c et seq. (education), 2000d et seq. (non-discrimination in federal programs), 2000e et seq.(employment) and 3601 et seq.(housing).

the entire segregated system which denied them and others their rights to equal treatment in the first place. See, e.g., Green v. County School Board of New Kent County, Virginia, 391 U.S. 430 (1968) (plaintiffs in school desegregation cases held entitled to complete disestablishment of dual system; admission of individual black pupils to white schools insufficient); Griggs v. Duke Power Company, 401 U.S. 424 (1971) (relief in employment discrimination cases includes elimination of testing, and revision of transfer and seniority procedures); Washington v. Lee, 263 F.Supp. 327 (N.D. Ala. 1966), aff'd per curiam, 390 U.S. 333 (1967) (private litigation to desegregate Alabama penal system resulted in schedule for desegregation of all such institutions in the state); Green v. Kennedy, 309 F.Supp. 1127 (D.C. 1970), appeals dismissed for want of jurisdiction, sub nom Cannon v. Green, 398 U.S. 956 (1970); and Coit v. Green, 400 U.S. 986 (1971), continued as Green v. Connally, 330 F.Supp. 1150 (D.C. 1971), aff'd sub nom Coit v. Green, 404 U.S. 997 (1971) (private litigants obtained injunction against federal tax exemptions for private schools with discriminatory admissions policy in Mississippi). The significance of these decisions is to establish that minority citizens who are individually affected by violations of the Civil Rights Acts have standing pursuant to these acts to challenge the system-wide segregation or discriminatory policies that are ultimately responsible for their injury.

Most recently, in Adams v. Richardson, supra,

480 F.2d 1159, the Circuit Court for the District of Columbia in an en banc, per curiam opinion sustained a district court injunction ordering the Department of Health, Education and Welfare (HEW) to commence compliance and enforcement proceedings under Title VI of the 1964 Civil Rights Act against ten state-operated systems of higher education; seventy-four secondary and primary school districts found to have reneged on previously approved desegregation plans; and against forty-two other districts found by HEW in presumptive violation of the dictates of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). Plaintiffs in Adams were "certain black students, citizens, and taxpayers" (480 F.2d at 1161). Neither the district court nor the Court of Appeals, sitting en banc were troubled by the fact that the plaintiffs were not "potential" users or residents of the several hundred school districts involved.

The Court in Adams implicitly recognized the source of plaintiffs' standing when it accepted plaintiffs' contention that HEW had "consciously and expressly adopted a general policy [of non-enforcement] which [was] in effect an abdication of its statutory duty" (emphasis added). 480 F.2d at 1162.

The foregoing cases clearly demonstrate that Black and Spanish-speaking citizens of an area infected with "the complex problem of system-wide racial imbalance" (Adams, supra, at 1164 n.10) have a "personal stake" in the enforcement of

Title VI and Title VIII in the administration of federal assistance programs.

Patterns of racial residential segregation have been singled out as the "cornerstone of segregation" by at least one national commission. (Report of the National Advisory Commission on Civil Disorders, Bantam ed. 1968 at 475). Recently, the Supreme Court has recognized residential racial segregation as a prime factor contributing to the perpetuation of school segregation.*

Now that Congress has mandated that federal authority be brought to bear on the problem of residential segregation, the courts must grant judicial access to those who have the utmost interest in eliminating segregation; otherwise the Congressional civil rights policies will be undermined.

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* In noting the effect of various apparently neutral programs and decisions on residential and school segregation, the Supreme Court in Keyes v. School District No. 1, Denver Colo., 93 S.Ct. 2686 (1973), quoted its own language from Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), writing:

> "In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since Brown, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from

This Court's recent decision in Warth v. Seldin (Nos. 73-1748,49) (2d Cir., April 18, 1974), does not detract from the foregoing analysis of appellants' standing. In Warth, this Court was neither presented with the question of who is an "aggrieved" party under the Administrative Procedure Act nor with the question of who has standing to seek judicial review of the failure of federal agencies to implement Congressional civil rights policies.

Warth involved a direct challenge to the zoning ordinance of a suburban community on the grounds that the ordinance violated rights to due process and equal protection of the laws under the Fourteenth Amendment. The plaintiffs included several organizations and some low-income minority residents of the nearby City of Rochester. Judge Hays, writing for this Court, was troubled by the absence of a specific proposal for low-cost housing in the defendant community for which the low-income plaintiffs would be eligible and by the absence from the litigation of developers whose proposals

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*(footnote continued)

> the formal principles of 'neighborhood zoning'. Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.' 402 U.S. at 20-21, 91 S.Ct. at 1278." 93 S.Ct. 2694-2695.

for low-cost housing had allegedly been rejected by the defendant community.

The district court's reliance on Warth is erroneous because the court's argument presupposes its result, i.e., the district court begins by assuming that "plaintiffs status as 'potential residents' of New Castle" is the basis of their alleged injury in fact [102a-103a]. Having made this assumption, the district court arrives at the facile conclusion that Warth is apposite because it dealt with plaintiffs who did allege injury arising out of their status as potential residents of a so-called "exclusionary" community.

Appellants must point out again, however, that the source of their injury is the administrative misconduct and failures so graphically made out in the record below. Failure of meaningful civil rights enforcement by HUD and BOR would be just as significant, and illegal, if the community development grants in question were being made to New York City; and appellants, if they resided in racially concentrated areas of New York City or its environs, would have standing to challenge such grants. See Shannon v. HUD, supra, (dealing with the civil rights impact of an administrative decision affecting racial concentration in a ghetto neighborhood in Philadelphia).

Whether or not appellants ever come to reside in the

Town of New Castle or have any present desire to reside there, the lack of federal administrative pressure on New Castle to encourage fair housing opportunity within its borders through local housing and community development policy directly and materially contributes to growing patterns of racial segregation in Westchester County. Increased fair housing opportunity in New Castle and similar communities, if nothing else, will offer appellants and the class they seek to represent a choice that they do not presently have -- and which Congress required they be given. Moreover, increased fair housing opportunity would insure that appellants, if they remained in their present neighborhoods in Yonkers, Peekskill, Ossining and White Plains, would no longer live in ghettoized, racially concentrated neighborhoods.

One of the most vivid examples of what may have been lost as a result of HUD and BOR's failure is the 100 units of low-cost housing proposed by the New York State Urban Development Corporation for New Castle [96a]. At the very point in time that New Castle was publicly and successfully thwarting even this modest attempt to create fair housing opportunities outside the ghetto areas of the County, HUD and BOR were blithely giving New Castle a transfusion of federal money.

Appellants' injury does not flow from their status

as potential beneficiaries of the UDC project, or even from their status as potential residents of New Castle; but it does flow from the social "pollution" of County-wide segregation that has been created and maintained with the assistance of federal housing and community development programs.

Thus, it can be seen that Warth presents vastly different standing problems than a challenge to federal agency action. This Court, in its landmark standing decision, Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (1965), recognized that where a federal statute allows review of administrative actions by "aggrieved parties", standing is to be liberally construed. In Scenic Hudson, this Court conferred standing on a public-interest group comprised of individuals who alleged an interest in preserving the aesthetic and recreational value of the Storm King Mountain area in New York. Finding that an injury flowed from the members' residence in the affected area and their possible use of the area for recreation, Judge Hays, writing for this Court, stated:

> Although a "case" or "controversy" which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a "case" or "controversy." The "case" or "controversy" requirement of Article III, Section 2 of the Constitution does not require that an "aggrieved" or "adversely affected" party have a personal economic interest. 354 F.2d at 615.

Neither of the Supreme Court's recent decisions, O'Shea v. Littleton, supra (cited by the district court), or California Bankers Ass'n v. Schultz, ___U.S.___(1974), are applicable to the issue of appellants' standing in the instant case. They are distinguishable in one very critical respect. In these decisions, as in Warth, there was a specific group of identifiable plaintiffs that were directly harmed by the challenged action and who were not before the Court. Thus, in Warth, there were developers who had specific low-cost housing proposals that had been rejected by the defendant community; in O'Shea there were individuals who had been, and were, being directly harassed by the Cicero police, and in California Bankers, there were bank depositors with large enough deposits to be within the scope of the challenged statute. In each one of these cases, individuals with the greatest interest in the matter were not before the Court. There are no potential plaintiffs with a greater interest in having the federal agencies promote fair housing in connection with the funding of community development programs in Westchester County than those already before the Court. Unlike all those other decisions, a finding of no standing here would insure that no one could ever obtain judicial review of the agencies' performance.*

* The district court argues that neighboring towns that have low-income housing and minority concentration and that are denied federal funds in favor of the New Castle grants represent another class of potential plaintiffs. This argument hinges on the erroneous assumption that the Fair Housing Act protects municipalities suffering from racial concentration rather than individual victims of racial housing segregation. Appellants find the idea that municipalities are protected intriguing, but not one that was intended by Congress in adopting the Act nor one which other courts are likely to approve.

III. APPELLANTS ARE WITHIN THE ZONE OF INTERESTS PROTECTED BY TITLE VIII OF THE FAIR HOUSING ACT

The district court correctly disposed of the government 's contention that appellants were not asserting interests within the "zone of interests" of the two community development grant statutes by indicating the obvious - that appellants are asserting interests alleged to be "under the umbrella of the Civil Rights Act " [100 a]; however the court does not pursue its analysis of the "zone of interests" since it concludes that appellants have failed to allege "injury in fact".

Appellants submit that the interests they assert unquestionably fall within the zone of interests to be protected by the Fair Housing Act. This conclusion is inevitable in light of the language of the Act, its purposes and legislative history, and its interpretation by HUD, the agency principally charged with its administration and enforcement.

1. The Language of Title VIII

Initially, the question of "zone of interests" must focus upon the statute giving rise to the right in issue. The introductory section of Title VIII broadly sets forth the purpose of the legislation:

> It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States. (42 U.S.C. §3601).

The wide scope of the Act is underscored by the panoply of discriminatory practices proscribed (see, e.g. 42 U.S.C. 3604), and by the broad administrative and judicial relief available. (42 U.S.C. 3610, 3612).

In the case of private actions, Title VIII provides for suit by a "person aggrieved" which is specifically defined as "any person who claims to have been injured by a discriminatory housing practice (emphasis added, 42 U.S.C. 3610 a, d) or who believes he will be so injured.

In addition to the sections proscribing certain private forms of discrimination, the Act directs that all federal executive departments and agencies, and specifically the Secretary of HUD, "administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title . . ." 42 U.S.C. 3608 (d) and (e) (5). Further, all executive departments and agencies are instructed to cooperate with HUD in affirmatively furthering fair housing. 42 U.S.C. 3608 (d). The Courts have held that administrative actions alleged to be in violation of this "affirmative" obligation are violations of the Act which are judicially reviewable under 42 U.S.C. 3610 and 3612. Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970), Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971); Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (E.D. N.Y. 1972);

See also Otero v. New York City Housing Authority, 484 F.2d 1122 (2nd Cir. 1973).

Taken together, these sections indicate that appellants' claimed injury of reinforced racial ghettoization as a result of HUD and BOR's abdication of any fair housing effort in the processing of the federal grants to New Castle is an interest within the zone protected by the Fair Housing Act.

2. The Legislative History of Title VIII

The history of Title VIII, although not directly touching the issue of standing, indicates a Congressional intent to provide a broadly remedial statute to begin to reverse prevailing patterns of racial segregation.

In introducing the legislation that eventually was enacted as Title VIII, Senator Mondale particularly emphasized the need to remedy federal involvement in funding programs which perpetuated racial residential segregation. He pointed to what he called the:

> "sordid story of which all Americans should be ashamed, developed by this country in the immediate post World War II era, during which the FHA, the VA, and other federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of White America.... Traditionally, the American Government has been more than neutral on this issue. The record of the United States Government in that

> period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city, and the alienation of good people from good people because of the utter irrelevancy of color." 114 Cong. Rec. 989 (1968)*

The "affirmative" obligation imposed on the federal agencies by Title VIII (42 U.S.C. 3608), in the spirit of the Title VI requirement of non-discrimination in federal programs, recognizes that the federal government has a greater obligation to deal with the discriminatory effects of its own programs than do other levels of government. The legislative history clearly establishes that Congress intended affirmative use of federal programs as the principal weapon in "the complete arsenal of federal authority" created by the Fair Housing Act. Jones v. Alfred A. Mayer Co., 342 U.S. 409, 417 (1968).

The report of the National Advisory Commission on Civil Disorders attests to the significance of utilizing federal programs to reverse the trend of racial segregation:

> Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central city

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* See also the remarks of Rep. Celler (114 Cong. Re.9563 (1968)): "The purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos . . . . ."

> ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them.
> (The National Advisory Commission on Civil Disorders, Bantam Edition at 474.) (Emphasis added.)

The Supreme Court has already held that Title VI of the 1964 Civil Rights Act and Title VIII of the 1968 Civil Rights Act, in allowing a suit to be commenced by an "aggrieved" person, shows "a Congressional intention to define standing as broadly as is permitted by Article III of the Constitution." Trafficante v. Metropolitan Life Ins. Co., supra, 93 S. Ct. 364.

The specific injury alleged by the plaintiffs in Trafficante was "the loss of important benefits from interracial association." (Id. at 367.) This injury is even more general and less tangible than the devastating impact of life in America's urban ghettos.

The Third Circuit in Shannon, supra 436 F.2d 809, described the evolution of a federal agency's responsibility to redress patterns of racial segregation, writing:

> "Read together, the Housing act of 1949 and the Civil Rights Act of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary [of HUD] in examining whether a plan presented by a LPA [Local Planning Agency] included a workable program for community

> improvement, could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964, he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing." 436 F.2d at 816.

The Shannon court then ordered that federal financial assistance for an already constructed but as yet not federally subsidized, multi-family project be enjoined until HUD had taken the "necessary procedural and substantive steps" to insure that the project would be part of a program of community development that aimed at eliminating racially segregated neighborhoods in Philadelphia.

The Court held in Shannon that white and Black businessmen and residents of a racially concentrated area had standing to challenge a proposed low-income housing project although they would not be displaced by it and certainly would not live in it. Defendant had argued that since the plaintiffs there were "neither displaced residents nor potential occupants" of the affected area, they had "too remote an interest" to permit their challenge. The Court, reading the language of the Fair Housing Law disagreed, holding that the proposed project would affect "not only their investments in homes and businesses, but even the very quality of their daily lives." (436 F.2d at 818). This

holding is cited with approval by the Supreme Court in Trafficante, supra, 93 S.Ct. at 368.

As residents of neighboring ghetto areas suffering from the lack of decent, integrated housing opportunities, appellants are exactly the persons whom Congress sought to protect and assist when it mandated that federal agencies "affirmatively further" fair housing opportunities in the administration of federal community development assistance to New Castle and to all other communities.

3. Interpretation of Title VIII by the Agency Principally Charged with Administration and Enforcement

As the Agency primarily involved in administering Title VIII, HUD has formally stated in the Historical Overview - Equal Opportunity in Housing, prepared by it in October 1972, that the affirmative action requirement of Title VIII specifically applies to community development programs like those proposed for New Castle:

> "A substantial number of programs are subject to these affirmative provisions including those relating to urban renewal, model cities, grants for sewer and water installation, roads, schools and other public facilities relating to urban development." P-H Equal Opportunity Housing Reporter, Par. 2301, at 2316. (Emphasis added).

This HUD policy was recognized by appellee S. William Green,

Regional Administrator of HUD, who stated in his deposition, below, that Title VIII applied to the sewer grant in question and that the type of housing development that could occur in a community is intimately related to other aspects of community development such as the construction of a sewer system, because "as a practical matter, intense development requires sewer lines and sewage treatment plants"[131a]. Thus, HUD has recognized that it has the obligation to perform Title VIII review in its sewer program and other community development programs, even though HUD has done nothing to implement this obligation.*

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* It has been frequently noted that the intrepretation of a federal statute by the agency charged with its administration is entitled to substantial weight. As the Supreme Court stated in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustai the Commission's application of this statutory term we need not find that its construction is the only reasonable one, or even that it is the result we would have rendered in the first instance in judicial proceedings. Unemployment Commission v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583."

Title VIII was discussed by this Court in Warth, supra. The Court apparently concluded that plaintiffs in Warth either had no Title VIII claims or those claims, if raised, were indistinguishable from the alleged violations of the Equal Protection Clause of the Fourteenth Amendment. Nonetheless, the Court did note the broad, "private attorney general" standing which exists under Title VIII as a result of its particular legislative history and of the "practical difficulties of enforcing the Act." Slip opin. at 2949. As it did in Warth, this Court must now bear in mind the Supreme Court's repeated admonition that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." O'Shea v. Littleton, supra, 675 n.10 (1974). See also, Scenic Hudson, supra, 354 F.2d at 615.

Had the lower court focused its analysis on federal agency responsibilities under Title VIII rather than on the zoning laws of New Castle, it is clear that it would have accorded appellants the standing to sue which is their Congresionally conferred right.

IV. APPELLANTS HAVE STANDING TO CHALLENGE TRI-STATE'S ABDICATION OF ITS CIVIL RIGHTS RESPONSIBILITIES

Although the district court briefly discusses the Tri-State Regional Planning Commission and the appellants' claims against the Commission, the court never states why appellants lack standing to sue Tri-State. Apparently the district court incorrectly assumes that appellants' claims against Tri-State are sufficiently similar to the claims against HUD and BOR that dismissal of the latter warrants dismissal of the Tri-State claims on the same grounds. In reality, the only similarity between the two sets of claims is that they both arise out of the two community development grants to New Castle. The district court errs by not examining Tri-State's unique and entirely separate civil rights enforcement responsibilities.

As the designated Metropolitan Clearinghouse, Tri-State is a state agency that has entered into a quasi-contractual relationship with the Federal government to perform the Federal function of reviewing and coordinating local applications for various Federal grants-in-aid. The review process derives its name from the Office of Management and Budget (OMB) Circular A-95 that was promulgated by OMB to implement the Demonstration Cities and Metropolitan Development Act (42 U.S.C. 3334) and the Intergovernmental Cooperation Act (42 U.S.C.4231).

Those acts provide that "all Federal aid for development purposes shall be consistent with and further" comprehensive planning and that all applications for certain community development programs, including those challenged here, "shall be submitted for review to any area wide agency which is designated to perform metropolitan or regional planning . . . . ." 42 U.S.C. 3334 (a) (1) (emphasis added). Tri-State has been designated as the area wide review agency for the New York metropolitan area including all of Westchester County.

The A-95 circular creates a project notification and review system (PNRS) designed to allow an area wide planning organization (or metropolitan clearinghouse), an opportunity early in the application process to comment on "whether the project is in accord with Federal law governing that program" (A-95, p.3) and whether the project is consistent with comprehensive planning for the area in question - particularly whether it conforms to the objectives of the Intergovernmental Cooperation Act and the A-95 circular itself. Finally, the metropolitan clearinghouse is responsible for circulating the applications for comment to other state and local agencies whose interests may be affected by the proposed projects.

One of the principal objectives of the Intergovern-

mental Cooperation Act is the consideration at the regional level of the impact which a federally-funded program will have upon housing and human resources development 42 U.S.C. 4231(d). The A-95 circular, itself, has embraced this statutory command by listing among subject matter for clearinghouse comment,

> "the extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups." A-95, Para. 5(d).

The clearinghouse also has the obligation to provide "public agencies charged with enforcing state and local civil rights laws with opportunity to review and comment on the civil rights aspects of the project." Id., Para 3(d). Clearly, Tri-State has a significant role in monitoring the civil rights impact of proposed federal projects and in promoting fair housing opportunities. Clearly, too, Tri-State is specifically charged with determining the area wide impact of projects for which federal funding has been sought.

Instead of acting in accordance with these statutory and regulatory guidelines, however, Tri-State arrogated to itself the power to designate some applications as lacking "regional significance" and, thus, to decline review of these applications. In so doing, Tri-State has violated the spirit

and the letter of the governing statutes and regulations and has acted beyond the scope of its authority.

As required by law in the instant case, Tri-State received the funding applications for the King-Greeley sewer district and the Turner Swamp recreational facility in New Castle but it failed to review the applications, stating, in both cases, that the proposed projects lacked "regional significance". Tri-State simply returned the preliminary applications to the Westchester County Planning Commission for local review before the applications were forwarded to HUD and BOR respectively. Appellants contend that Tri-State's failure and refusal to review the preliminary grant applications other than to dub them of non-regional significance is completely outside the scope of that body's federally defined statutory authority and operates totally to frustrate the congressional purpose of attaining full review of the regional impact of federal categorical grant-in-aid programs.*

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* Tri-State cannot rely on the defense that pursuant to the A-95 circular an application may be submitted to the appropriate federal agency without clearinghouse comment if the clearinghouse has failed to comment within a specified period of time. In those circumstances, the federal agencies are on notice that no review took place and they therefore have an independent responsibility to review the environmental and civil rights implications of the application. By designating a project of no regional significance, Tri-State has implicitly stamped the application with its approval, at least insofar as any review of the regional civil rights and environmental implications of the project are concerned. This procedure virtually insures that only local review of an application will occur and, most critically for the appellants, that the impact of community development programs on regional patterns of racial segregation will never be considered.

The nexus between Tri-State's failure to perform the A-95 civil rights review or to insure that it is performed by the Westchester County Planning Commission and appellants' injury is apparent. The exclusive purpose of the A-95 review is to insure that each and every Federal community development grant in the region is reviewed from the perspective of its effect on "balanced patterns of settlement" in the region and the effective delivery of services to members of minority groups. Appellants are precisely those minority persons residing in the region who suffer from the non-existence of "balanced patterns of settlement".

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed and this cause remanded for further proceedings on the merits of the appellants' complaint.

Respectfully submitted,

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